SUPPLEMENTAL BRIEF FOR COMPLAINANT.

CHAPTER I.

1.

The decree of the court below a final decree.

The decree of the circuit court of appeals remands the case to the circuit court "with instructions TO SET ASIDE ITS DECREE ADJUDGING THAT THE ORDER OF THE COMMISSION BE ENFORCED, AND DISMISS THE APPLICATION MADE FOR THAT PURPOSE WITH COSTS, the whole to be without prejudice to the right of the Commission to proceed upon the evidence already introduced before it, or upon *such further pleadings and evidence* as it may allow to be made or introduced, to hear and determine the controversy according to law."

2.

This decree is final because, *first*, it leaves the court below "no power to enter any other" decree "or to consider or to determine other matters not included in the duty of entering the" decree "as directed." (*Wabash R. R. Co.* v. *Tourville*, 179 U. S., p. 326.)

3.

This decree finally determines the present suit.

The decree is final because it finally determines the *present case in court*. The fact that it recognizes a right in the complainant to institute another proceeding in reference to the same subject-matter does not deprive it of the character of finality as to the pending suit.

"*A final judgment means not a final determination of the rights of the parties with reference to the subject-matter of the*

litigation, but merely of their rights WITH REFERENCE TO THE PARTICULAR SUIT. In other words, it is not at all necessary that the judgment should be upon the *merits*, if it definitely puts the case out of court. A judgment of nonsuit is final though it does not reach the merits. IT IS THE TERMINATION OF THE INDIVIDUAL ACTION WHICH MARKS THE FINALITY OF THE JUDGMENT."

(Black on Judgments, sec. ed. Vol. I, sec. 21, p. 32.)

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4.

This decree finally disposes of the *case in court*, by directing that "the decree of the circuit court in favor of the Commission be set aside and that the Commission's bill of complaint or application for the enforcement of its order be *dismissed with costs.*" *If the bill is dismissed, that is an end of the pending case in court.*

5.

Case in court can not be reopened.

The fact that the dismissal is without prejudice to the right of the Commission to reinvestigate, *if it see proper*, does not affect the finality of the decree so far as *the present case in court* is concerned. *It does not authorize a reopening of the pending case in court; that case is finally dismissed and disposed of.*

6.

The reinvestigation suggested in the decree is a *new* investigation on "*further pleadings and evidence.*"

Even if the Commission should institute a reinvestigation of the matter before itself, and should make an order against the defendants on such reinvestigation, *a new suit would have to be instituted in the circuit court for the enforcement of that order.*

7.

The Commission, however, would be simply stultifying itself in reinvestigating the case in view of the fact that, as

shown in the petition for a rehearing to the circuit court of appeals, the Commission has already fully investigated the case. *A copy of that petition is hereto attached as Exhibit A.* (See Rec., pp. 423–426.)

8.

The fact that a decree is no bar to another suit does not render it the less final in the pending suit.

A decree dismissing a bill for matters *not involving the merits* is no bar to a subsequent suit, but to constitute a final decree for the purpose of appeal it is not essential that it should be a bar to another suit.

Hughes v. *U. S.*, 4 Wall., 232.

Colorado Eastern Rwy. Co. v. *Union Pacific Rwy. Co.*, 94 Fed. Rep., 312.

9.

The decree does not authorize further proceedings by a lower court or any officer thereof.

In all the cases in which decrees have been held to be not final because of further proceedings to be had, the further proceedings are directed to be taken *either by the court below or some officer thereof*, such as a master in chancery. The Interstate Commerce Commission, complainant in this case, is not an agency of the court.

10.

THE REINVESTIGATION IS MERELY SUGGESTED in the decree. It is not made compulsory. This also distinguishes this case from the other cases which have been before the courts.

CHAPTER II.

1.

Decree of circuit court of appeals erroneous.

That the decree of the circuit court of appeals is erroneous is demonstrated in the petition for rehearing, Exhibit A hereto. (See also Chapter XLVIII, pp. 143, 144, original printed argument filed in this court.)

2.

If it is held to be incumbent upon the Commission under the decree of the lower court to reinvestigate a matter which it has already fully and to the best of its ability investigated, *then the Commission is practically denied all right of appeal, and the case can never reach this court.*

3.

The fact, if it be a fact, that the Commission has, in the opinion of the circuit court of appeals, erred in its conclusions either of law or of fact, is no ground for that court's making a reinvestigation incumbent upon the Commission. The finding of the circuit court of appeals on those points adverse to the finding of the Commission is a proper subject of review by this court, and the circuit court of appeals *can not deprive the Commission of the right of appeal to this court by such a palpably erroneous order as that made in this case.*

4.

The Commission promptly petitioned the circuit court of appeals for a rehearing, demonstrating in that petition the error of the court in the decree rendered by it. The rehearing was denied. WHAT REMEDY HAD THE COMMISSION, IF NOT BY APPEAL TO THIS COURT?

CHAPTER III.

1.

The hauls from New Orleans to Lagrange strictly through hauls.

Counsel for the carriers in his oral argument asserted that after traffic from New Orleans reached Montgomery it was hauled on to Lagrange as local traffic. This, if true in any sense, is no more true in respect to shipments to Lagrange than in respect to shipments to Atlanta. The undisputed testimony is that all traffic to Lagrange whether in carloads or less than carloads is shipped under a through bill of lading naming the aggregate through rate.

(Record, bot. p. 284, top p. 285; 291; 312.)

2.

No extra expense on Lagrange traffic whether in carloads or less than carloads.

Carloads.

When goods are hauled in *carloads* from New Orleans to Lagrange they are hauled in the cars in which they are originally shipped all the way to Lagrange just as in the case of Atlanta. The only transfer both on shipments to Atlanta and shipments to Lagrange in carloads is at Montgomery, and there is no extra expense on such shipments to Lagrange over that on such shipments to Atlanta.

(Record, 365; original printed argument, p. 74.)

3.

Less than carloads.

The same is the case as to less than carload shipments both to Lagrange and to Atlanta.

(Record, bot. p. 363, top p. 364; original printed argument, pp. 74, 75.)

Respectfully submitted.

L. A. SHAVER,
Solicitor.

EXHIBIT A.

United States circuit court of appeals for the fifth circuit.
November term, 1900.

THE LOUISVILLE AND NASHVILLE RAILROAD Company, The Western Railway of Alabama, and The Atlanta and West Point Railroad Company, appellants, *v.* THE INTERSTATE COMMERCE COMMISSION, appellee.	No. 910.

PETITION FOR REHEARING.

The Interstate Commerce Commission, appellee in the above-named cause, respectfully petitions the court for the vacation of the order or decree therein made May 14, 1901, and for a rehearing thereof on the following grounds:

1. Said order or decree of the court remands said cause to the circuit court, "with instructions to set aside its decree adjudging that the order of the Commission be enforced, and dismiss the application made for that purpose, with costs, the whole to be without prejudice to the right of the Commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the controversy according to law," and as precedent or authority for this order cites the "opinions of the Supreme Court of the United States in *Interstate Commerce Commission* v. *The Clyde*

Steamship Company et als. and *The East Tennessee, Virginia and Georgia Railway Company et als.* v. *The Interstate Commerce Commission*, recently decided, not yet reported." (181 U. S., pp. 1, 29.)

2. In the two cases cited in the order or decree of this court, and also in *Louisville and Nashville Railroad Company* v. *Behlmer* (175 U. S., 648), the Supreme Court made the same order as is made by this court in the present case, *but the ground upon which the Supreme Court made the order in the cases named does not exist in the present case.*

3. In the said cases cited by this court and in the Behlmer case (*supra*) the Commission refused to consider competition *by carriers subject to the act to regulate commerce*, as constituting the substantial dissimilarity of circumstances and conditions which would take a case from under the rule of section 4 of the act, on the ground that such competition could not be considered by them except on application by the carriers under the proviso to the fourth section of the act for relief from the rule of that section.

The ruling of the Commission on this point, in the opinion of the Commission in *Georgia Railroad Commission* v. *Clyde Steamship Company et al.*, one of the cases cited by this court in the order in this case, and quoted by the Supreme Court in *East Tennessee, Virginia and Georgia Railway Company* v. *Interstate Commerce Commission*, the other case cited by this court in its order in this case, was thus stated by the Commission:

"The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the fourth section, in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers *not subject to regulation under the act to regulate commerce.* In other cases under the fourth section" (that is, cases of competition by carriers subject to the act) "the circumstances and conditions are not *presumptively* dissimilar and the car-

riers must not charge less for the longer distance *except under the order of the Commission.*" (That is, order of Commission on application to the Commission for relief under the proviso to the fourth section.) (Italics mine.)

The Supreme Court in *Interstate Commerce Commission* v. *Alabama Midland Railway Company* (168 U. S., 144, 164) held that this construction of the law by the Commission was erroneous, and this ruling was affirmed by the Supreme Court in the two cases cited by this court in its order in this case and in the Behlmer case (*supra*).

The Supreme Court further held in the three last-named cases that because of this erroneous construction of the law the Commission had unduly restricted its inquiries into the facts, and that, inasmuch as "the defendant was entitled to have its defense considered, in the first instance at least, by the Commission, *upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded*," the cases should be remanded to the circuit court with instructions to that court to set aside its decree and to dismiss the application of the Commission for the enforcement of its order, "*the whole to be* without prejudice to the right of the Commission to proceed upon the evidence already introduced before it or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the matter in controversy according to law."

This order was based solely upon the ground that the Commission had unduly restricted its inquiries into the facts because of its mistaken view of the law, and that thereby injury had been done the defendant who was, in the language of the court, "*entitled to have its defense considered, in the first instance at least, by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded.*"

4. The present case was decided by the Commission, December 31, 1897, nearly two months after the decision of the

Supreme Court in *Interstate Commerce Commission* v. *Alabama Midland Railway Company* (*supra*), holding that the Commission had erred as above stated, and the Commission, being advised of the latter decision, did not in the present case repeat its said error.

An examination of the opinion of the Commission in this case shows that it did not unduly restrict its inquiries as to any matter presented for its consideration, either by the pleadings or testimony, and that in particular it fully considered competition of every character set up. This will appear from the following extracts from its opinion:

"It remains to be determined under this branch of the case whether competition at Atlanta causes transportation of freight by the defendants from New Orleans to Hogansville, Newnan, Palmetto, or Fairburn to be conducted under circumstances and conditions which are substantially dissimilar from those which affect the transportation of like traffic from New Orleans to Lagrange. *This includes both the competition of markets for supplying goods to Atlanta and the competition of carriers for the carriage of freights to that point* from New Orleans and from Western, Northern, and Northeastern cities." (Italics mine.) (Opinion of the Commission, p. 6.)

The Commission announced its conclusion as to competition in the following language:

"*Having fully considered all the evidence and material facts and given due weight to the competition of carriers and of markets for Atlanta trade*, together with the fair interests of the defendant carriers, the interests of the communities involved, and those of the complainants and other dealers (the Import Rate case—*Texas and P. R. Co.* v. *I. C. C.*, 162 U. S., 197; *I. C. C.* v. *Alabama Midland Railway Co.*, 168 U. S., 144), we find and hold that transportation of freights by defendants from New Orleans to Lagrange and the transportation of like freight from New Orleans to Fairburn are under substantially similar circumstances and conditions; and that the same is true as to such transportation by defendants to Lagrange and Hogansville, Lagrange and Newnan, and Lagrange and Palmetto." (Italics mine.) (Opinion of the Commission, p. 8.)

5. This case does not belong to the class of cases in which the Supreme Court made orders such as that made by this court in the present case. The Commission has already in this case "heard and determined the matter in controversy *according to law*" in the sense of those words as used by the Supreme Court.

Respectfully submitted.

L. A. SHAVER,
Solicitor for the Appellee.

I, L. A. Shaver, counsel for the Interstate Commerce Commission, appellee in the above-stated cause, hereby certify that the foregoing petition for a rehearing is not interposed for delay, and that the same is, in my judgment, well founded. This the 23d day of May, 1901.

L. A. SHAVER,
Solicitor for the Appellee.

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